

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 19, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1300-CR**

**Cir. Ct. No. 2009CF833**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TIMOTHY T. MURRY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA and JASON A. ROSSELL, Judges.  
*Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Timothy T. Murry appeals from a judgment of conviction and an order denying his motion for postconviction relief.<sup>1</sup> He contends that the circuit court erroneously exercised its discretion by admitting other acts evidence against him. He further contends that his trial counsel was ineffective for failing to persuade the circuit court to exclude the other acts evidence. We reject Murry's claims and affirm the judgment and order.

¶2 Murry was convicted following a jury trial of two counts of attempted first degree intentional homicide by use of a dangerous weapon and three counts of first degree reckless endangerment by use of a dangerous weapon. The charges stemmed from allegations that Murry had participated in a shooting in the city of Kenosha in the summer of 2009.

¶3 In the 2009 shooting, three people were shot at while standing outside one of their homes. Two of the victims were struck by 9mm bullets. A third victim, who was not struck by the gunfire, was able to identify Murry as the shooter. The shooting appears to have been motivated by an ongoing dispute between one of the victims and at least two other women in a nearby neighborhood who were associated with Murry.

¶4 Prior to trial, the State moved for the admission of various other acts evidence against Murry. Ultimately, over the objection of Murry's trial counsel, the circuit court allowed the State to present evidence of an unrelated but factually similar shooting in the city of Racine in 2007, in which Murry fired a 9mm pistol

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<sup>1</sup> The Honorable Barbara A. Kluka entered the judgment of conviction. The Honorable Jason A. Rossell entered the order denying Murry's postconviction motion.

at an individual during a dispute on a public street.<sup>2</sup> The court admitted this evidence to aid in identifying Murry as the shooter in the instant case.<sup>3</sup>

¶5 The case proceeded to trial, and a jury found Murry guilty on all five counts. The circuit court imposed an aggregate sentence of sixty-five years of imprisonment.

¶6 Murry subsequently filed a motion for postconviction relief alleging that his trial counsel had been ineffective for failing to persuade the circuit court to exclude the 2007 shooting as other acts evidence. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

¶7 On appeal, Murry first contends that the circuit court erroneously exercised its discretion by admitting the other acts evidence against him. He submits that the similarities between the 2007 and 2009 shootings were not sufficiently specific to prove identity.

¶8 The admissibility of other acts evidence is determined by using a three-step test: (1) whether the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2) (2011-12);<sup>4</sup> (2) whether it is relevant under § 904.01; and (3) whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay under § 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998). Section

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<sup>2</sup> The State had sought to introduce two other incidents in which Murry had used or displayed a firearm as other acts evidence. The circuit court denied those requests.

<sup>3</sup> Identity was an issue at Murry’s trial, as he maintained that the victim’s identification of him was unreliable and inaccurate.

<sup>4</sup> All references to the Wisconsin Statutes are to the 2011-12 version.

904.04(2) favors admissibility of other acts evidence except when offered to prove the propensity of the defendant to commit similar acts. *See State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993).

¶9 A circuit court’s decision to admit other acts evidence involves the exercise of discretion and will not be disturbed absent an erroneous exercise of discretion. *See State v. Hammer*, 2000 WI 92, ¶21, 236 Wis. 2d 686, 613 N.W.2d 629. We will uphold the circuit court’s decision if the court reviewed the relevant facts, applied a proper legal standard, and reached a reasonable conclusion. *State v. Gribble*, 2001 WI App 227, ¶39, 248 Wis. 2d 409, 636 N.W.2d 488.

¶10 Here, the circuit court conducted a thorough analysis under *Sullivan* before admitting evidence of the 2007 shooting as other acts evidence. First, the court determined that the evidence was offered for a proper purpose of proving Murry’s identity as the shooter in the instant case. Next, the court found the evidence to be relevant to proving identity because of its sufficient points of similarity with the 2009 shooting. *See State v. Fishnick*, 127 Wis. 2d 247, 263-64, 378 N.W.2d 272 (1985) (“In order for other-acts evidence to be admitted for purposes of identity, there should be such a concurrence of common features and so many points of similarity between the other acts and the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant.”) These similarities included: (1) each shooting was prompted by an argument or dispute, for which the shootings were intended as retribution; (2) a 9mm pistol was used in each shooting;<sup>5</sup> (3) four shots were fired in each

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<sup>5</sup> Murry’s use of a 9mm pistol was corroborated by other evidence at trial. The State called as witnesses numerous gang members with whom Murry had associated, who testified that Murry had been seen armed with a 9mm pistol on various occasions.

shooting; and (4) the victims in each case were unknown to the defendant.<sup>6</sup> Finally, the court concluded that the probative value of the evidence outweighed the danger of unfair prejudice.<sup>7</sup>

¶11 Reviewing the circuit court's decision, we are satisfied that it properly admitted evidence of the 2007 shooting as other acts evidence. The court reviewed the relevant facts and applied the correct legal standard. Moreover, there was a reasonable basis for its conclusion. As noted by the State, the similarities between the 2007 and 2009 shootings demonstrate an imprint of Murry as a violent, brazen individual, with no qualms about resorting to gun violence in public to resolve disputes. These antisocial behaviors are sufficiently unique to show an imprinting of someone who is distinguishable from the vast majority of the public.

¶12 Murry next contends that his trial counsel was ineffective for failing to persuade the circuit court to exclude the 2007 shooting as other acts evidence. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶13 Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless

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<sup>6</sup> While the shootings were twenty-three months apart, the circuit court noted that Murry was incarcerated for a period of time between them.

<sup>7</sup> The circuit court reduced the danger of unfair prejudice at trial with a limiting/cautionary instruction to the jury.

they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. *Id.* at 634.

¶14 At the hearing on Murry's postconviction motion, trial counsel testified about the arguments she made in opposition to admitting the 2007 shooting as other acts evidence. These arguments included the commonness of the 9mm weapon and the differing circumstances between the 2007 and 2009 shootings (i.e., one being a quick, emotional reaction, and the other seeming to have been a planned assault). The brief that she submitted on the matter also argued more generally that the evidence of Murry's involvement in the 2007 shooting did not have the effect of proving identity and would show only that he had a propensity to use firearms.

¶15 Although Murry now offers additional arguments<sup>8</sup> that counsel could have made regarding the 2007 shooting, basing an ineffective assistance of counsel claim on them engages in the kind of hindsight renounced by the Supreme Court. *See Strickland*, 466 U.S. at 689 (a fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effect of hindsight). In any event, because we are satisfied that the circuit court properly admitted evidence of the 2007 shooting as other acts evidence, its admission does not rise to the level of severity necessary to support a finding of prejudice. For these reasons, Murry's ineffective assistance of counsel claim must fail.

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<sup>8</sup> For example, Murry cites additional discrepancies between the two shootings such as the time they transpired (day versus night) and the number of victims targeted (one versus three).

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE  
809.23(1)(b)5.

